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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PETE O'SULLIVAN, TERRENCE WHIRTY, JACK CLARK, MIKE DELANEY, JOSEPH LAMONICA, JOSEPH O'NEAL, DANIEL CAULFIELD, KEVIN O'MALLEY, JAMES FITZGIBBON, DON SHELDREW, MICHAEL COLLINS, SCOTT LYNCH, THOMAS RUANE, LAWRENCE MAHLER, DANIEL O'FARRELL, JR., individually and as class representatives,

Petitioners,

v.

UNITED STATES OF AMERICA and THE CITY OF CHICAGO,

Respondents.

BRIEF OF RESPONDENT CITY OF CHICAGO IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JUDSON H. MINER *
Corporation Counsel
of the City of Chicago
610 City Hall
Chicago, Illinois 60602
(312) 744-7803

Attorney for Respondent City of Chicago

RUTH M. MOSCOVITCH
Chief Assistant Corporation Counsel

LYNN K. MITCELL
Assistant Corporation Counsel
Of Counsel

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED FOR REVIEW

1. Whether the "timeliness" requirement in intervention cases should be discarded, contrary to the express provisions of the Federal Rules of Civil Procedure 24(a) and (b), whenever a petitioner asserts that the basis for his intervention is to challenge a consent decree he claims is patently unconstitutional.

2. Whether the Seventh Circuit properly affirmed the district court's decision to deny petitioners' motion to intervene as untimely.

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STATEMENT OF THE CASE

Petitioners, white male candidates for firefighter positions in Chicago, seek to intervene to challenge the validity of the 1979 decree entered in this case. That decree settled the dispute between the parties regarding the manner in which firefighters should be hired to correct the adverse impact of a non-validated hiring examination administered by the Chicago Fire Department.

In 1973, the United States filed suit in this matter, alleging that the City of Chicago was engaged in a pattern or practice of discrimination against black and Hispanic individuals with respect to employment opportunities in its fire department (R. 1, p. 3). Specifically, the United States alleged that the hiring tests utilized by the City caused a disparate impact upon minority candidates and had not been shown to be job-related (R. 1, p. 3). After extensive negotiations, the parties entered into a consent decree in 1974, committing the City to adopt long-range goals to substantially increase the minority composition of firefighters in the Chicago Fire Department by at least 50 per cent over the next four years (Appendix to Petition, Amended Consent Decree, at 3D-4D).

In 1978, the City administered a firefighters examination, No. 8106, to thousands of applicants including the present petitioners. The 8106 test results had an indisputable adverse impact on minority candidates: 1,270 of the 4,132 whites passed but only 670 of the 3,286 black and Hispanic applicants passed (R. 168, Exh. B). The City did not attempt to validate the test as being job-related because such efforts would have been futile (R. 168, Exh. B).

The parties negotiated the use of the firefighter eligibility list compiled from the 8106 test. In 1979, the parties settled all issues then outstanding in this case by an "Agreed-To Injunctive Order in Resolution of Firefighters Hiring Issues" which was entered by the district court (R. 128). That order: (1) recommitted the City to the long-range hiring goals adopted in the 1974 consent decree; (2) required the City to develop and utilize a new non-discriminatory test; and (3) in the interim, permitted the City to hire firefighters from the eligibility list compiled from the 8106 test as follows:

> The 1979 Firefighter Eligibility List shall not be further used beyond July 1, 1981 or after the 500th name on the list has been reached, whichever occurs first, provided that if the defendants determine that the needs of the City of Chicago require further hiring from the 1979 Firefighter Eligibility List, such *further hiring shall be on the basis of one black or Spanish-surnamed applicant hired for every white applicant hired* (emphasis added).

The City complied with the provisions of that order. In February of 1982, the City began hiring firefighters from the 8106 list on a one-minority-to-one-white basis (R. 168, Exh. C). The City continued to do so until March of 1985. At that time, the City announced that a new firefighters examination had been developed, that the test would be administered the following June and, consequently, the City intended to retire the 8106 list (R. 168, Exh. C). While the list was still in effect, the City offered every petitioner a permanent firefighter position. Those offers were made in 1980 during a firefighters' strike, as petitioners concede (R. 180). Petitioners declined employment (Petitioner-Appellants' brief, p. vii). On April 2, 1985, the City mailed notifications to the 374 candidates remaining on the 8106 list, all of whom were white, advising them that they must take the new examination if they still wished to become Chicago firefighters (R. 168, Exh. C). Petitioners are persons whose names remained on the 8106 list.

On March 25, 1985, petitioners moved to intervene to declare the minority provision of the 1979 Agreed-To Injunctive Order unconstitutional and enjoin the City from retiring the 8106 list until all persons whose names appeared on the list had been hired (R. 149). Petitioners claimed that the sole reason for retiring the 8106 list was that all names of eligible minority candidates were ex-

hausted. Thus, petitioners argued, the retirement of the list was racially discriminatory.

The district court held that the application for intervention to challenge the 1979 decree was untimely (Appendix to Petition). The appellate court affirmed, holding that petitioners knew or should have known that their interest in being hired in rank order rather than pursuant to a white/minority ratio was adversely affected upon the entry of the Agreed-To Injunctive Order in 1979, or alternatively at the latest in 1982, when the City began hiring firefighters by the white/minority ratio. The appellate court therefore found petitioners' application, filed in 1985, to be untimely (Appendix to Petition). This petition for a writ of certiorari followed.

ARGUMENT

Despite petitioners' attempt to frame the issues in this case as complex unsettled questions of law, this case only presents the simple question of whether petitioners failed to file a timely motion to intervene.[1] Contrary to petitioners' assertions, the appellate court correctly affirmed the district court's decision to deny intervention on that

[1] Petitioners improperly raise the issue that the Equal Protection Clause prohibits a public employer from entering into a consent decree which provides for racial preferences in hiring where there is neither a compelling state interest nor findings of racial discrimination (Petition, 12-17). Because petitioners were not allowed to intervene, neither court below addressed this issue. Moreover, petitioners advised the district court that they were not seeking review of the merits of their claims (R. 163). Accordingly, the City will not address the issue here.

basis and, in any event, this narrow, factual issue does not warrant Supreme Court review.

A.

NO UNSETTLED QUESTIONS OF LAW EXIST IN THIS CASE.

Petitioners present two arguments to attempt to convince this Court that unsettled questions of law exist in this case. Both arguments border on the frivolous. First, petitioners urge this Court to "grant a writ of certiorari to clarify exactly when and how an affirmative action consent decree may be attacked by third parties" (Petition, p. 19). That settled question obviously does not warrant review because the procedure is simply to file a timely application for intervention under Federal Rule of Civil Procedure 24(a) or (b).

Second, petitioners argue here, for the first time, that the "timeliness" requirement for intervention should be discarded when applicants claim that a consent decree is patently unconstitutional.[2] That argument does not merit review because the Federal Rules of Civil Procedure 24(a) and (b) bar any exception to the "timeliness" requirement in intervention cases. As this Court stressed in *NAACP v. New York*, 413 U.S. 345 (1973), under Fed. Rule Civ. Proc. 24, a motion to intervene must be denied unless the court is satisfied that the petitioner has moved to intervene in a timely manner:

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[2] Contrary to petitioners' claim that the record shows that the consent decree in this case is "patently unconstitutional", the record contains only petitioners' bald characterizations. The City properly never responded to those claims because the merits of the decree were never in issue.

> Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a) and Rule 24(b), that the application must be "timely." If it is untimely, intervention must be denied.

413 U.S. at 365. Thus, the "timeliness" requirement is a threshold matter which a court must determine before addressing the merits of any claim.

Petitioners are asking this Court to carve out a new *per se* rule that where a petitioner seeks to challenge a consent decree by claiming that the decree is patently unconstitutional, no showing of timeliness is required at all. Such a rule would obviously be unworkable, since all petitioners would simply adopt those magic words in their petitions to intervene. In any case, such a rule is unnecessary, since there is enough flexibility in the standard set forth by the federal courts for assessing the timeliness of a motion to intervene to prevent an unjust result under the circumstances of any given case. *See Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977).

Persons seeking intervention must be obligated to file their motion at the earliest opportunity to prevent undue prejudice to the litigants of the case as well as persons governed by the decree. Moreover, the long-standing interest in the finality of judgments would not be preserved if a consent decree, the negotiated compromise of the parties' differing positions, could be overturned lightly years after its implementation.

In sum, there is no reason to grant certiorari here. This case presents no unsettled question of law. As shown below, the court merely applied the particular facts of this case to settled principles of law. Review of that decision, which was clearly correct, does not merit the attention of this Court.

B.

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE NARROW, FACTUAL ISSUE OF WHETHER PETITIONERS FILED A TIMELY MOTION FOR INTERVENTION.

The Seventh Circuit in this case correctly affirmed the district court's decision that petitioners had failed to file a timely application for intervention. The Seventh Circuit carefully considered the factual record and assessed the timeliness of petitioners' application by the standard set forth in *NAACP v. New York*, 413 U.S. 345, 366 (1973) and the leading lower-court case, *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977). The court properly concluded from that review that petitioners should have moved to intervene when the Agreed-To Injunctive Order was entered in 1979. Their application filed six years later was, without question, untimely.

Petitioners concede that they have sought intervention to overturn the 1979 Agreed-To Injunctive Order principally on the ground that its white/minority ratio provision is unconstitutional. The terms of the 1979 Agreed-To Injunctive Order required the City to hire persons whose names appeared on the 8106 eligibility list by that ratio after a specified time and bound the City to discard the 8106 list when ratio hiring was no longer feasible. Petitioners, white males whose names appear on the 8106 eligibility list, claim they were denied employment on the basis of racial discrimination because the City retired the 8106 list when the names of minority candidates were exhausted.

A motion to intervene must be filed as soon as the applicants knew or should have known that their interest in the litigation might be adversely affected. *See United States v. South Bend Community School Corp.*, 710 F.2d

394, 396 (7th Cir. 1983). Here, under the terms of the 1979 decree, petitioners were notified that they might not be hired on account of their race. Where, as here, the consent decree was well-publicized—it is undisputed that petitioners were aware of the litigation even prior to the entry of the decree—petitioners should have intervened at the earliest opportunity, in 1979 upon entry of the decree. *See NAACP v. New York*, 413 U.S. 345 (1973). Yet, petitioners did not file their motion to intervene either at that time or when the ratio hiring went into effect in 1982. Petitioners did not seek intervention until the City announced the retirement of the 8106 list in 1985.

The Seventh Circuit correctly rejected petitioners' argument that their application in 1985 was timely because until that time they had assumed either that: (1) the 8106 list would be utilized only on a temporary basis or (2) the list of minority candidates would not run out. Mistaken assumptions do not justify an applicant's neglect to file a timely motion to intervene until those assumptions are proved wrong. *Baker, et al. v. United States and City of Chicago*, 769 F.2d 205 (7th Cir. 1986). The standard is an objective one. Actual knowledge of how the decree might adversely affect them is irrelevant if applicants should have known of this possibility and thus intervened at an earlier date. *NAACP v. New York*, 413 U.S. 345 (1973).

Nor can the petitioners rely on their mistaken assumption that a labor agreement between the City of Chicago and Fire Fighters Local No. 2 conferred upon them an unconditional right to employment. The agreement made no such promise. To the contrary, the agreement expressly incorporated the terms of the 1979 Agreed-To Injunctive Order and provided that those terms were paramount to the terms of the labor agreement (Collective Bargaining Agreement, Appellants' Appendix at 86).

There is no reason to grant certiorari in this case. Given the facts in this case, the district court undoubtedly did not abuse its discretion in finding petitioners' motion to intervene untimely.

C.

NO CONFLICT EXISTS BETWEEN THE OPINION BELOW AND THE SETTLED LAW OF THIS COURT AND OTHER COURTS.

Petitioners argue that the decision of the Seventh Circuit in this case conflicts with two decisions of this Court and with two decisions of the Seventh Circuit: *Local No. 93 International Association of Firefighters v. City of Cleveland*, 478 U.S. ____, 92 L.Ed.2d 405, 106 S.Ct. ____ (1986); *Wygant v. Jackson Board of Education*, 476 U.S. ____, 90 L.Ed.2d 260, 106 S.Ct. ____ (1986); *Janowiak v. City of South Bend*, 750 F.2d 557 (7th Cir. 1984); *Britton v. South Bend Community School District*, 775 F.2d 794 (7th Cir. 1985). However, no conflict in the decisions exists because none of those cases involves the issue of whether applicants have met the requirements for intervention.

The Seventh Circuit's decision in this case is entirely consistent with its prior decisions as well as the decisions of other circuits. For example, another panel of the Seventh Circuit reached a similar result in *Baker, et al. v. United States and City of Chicago*, 796 F.2d 205 (7th Cir. 1986). In that case, candidates whose names appeared on an eligibility list for police officer positions moved to intervene in 1985 to challenge the constitutionality of a white/minority ratio provision in a consent decree entered in 1982. The *Baker* panel denied the motion to intervene as untimely because the *Baker* candidates should have known that they would not be hired in rank order when the consent decree was entered in 1982.

The decision below is also consistent with the decisions of numerous other circuits assessing the timeliness of a motion to intervene to challenge white/minority ratios imposed to remedy an adverse impact upon minority applicants hired for public employment positions. In each case, the courts, rejecting a myriad of excuses for the failure to file a timely motion, held that the time to intervene is before or upon the entry of the decree imposing the white/minority ratios. *See e.g., Corely v. Jackson Police Department*, 755 F.2d 1207 (5th Cir. 1985); *Culbreath v. Dukakis*, 630 F.2d 15, 21 (1st Cir. 1980); *United States v. Jefferson County*, 720 F.2d 1511, 1516 (11th Cir. 1983); *Commonwealth of Pennsylvania v. Rizzo*, 530 F.2d 501, 507 (3rd Cir. 1976).

Thus, the Seventh Circuit's decision is supported by ample authority. No conflict exists between any of the cases cited by petitioners and this case. Petitioners' case has been treated with precision and thoroughness. Accordingly, their petition for a writ of certiorari should be denied.

CONCLUSION

For all the reasons listed above, respondent CITY OF CHICAGO respectfully requests that the Court deny the Writ of Certiorari.

Respectfully submitted,

JUDSON H. MINER *
Corporation Counsel
of the City of Chicago
610 City Hall
Chicago, Illinois 60602
(312) 744-7803

Attorney for Respondent
City of Chicago

RUTH M. MOSCOVITCH
Chief Assistant Corporation Counsel

LYNN K. MITCHELL
Assistant Corporation Counsel

Of Counsel

* Counsel of Record

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